Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Writ Petition No. 1001 of 2004 (M/S)

1. Sri Manoj Agrawal,
S/o Sri J.P. Agrawal,
R/o C-8/44 A,
Keshavpuram,
Lawrance Road, New Delhi
2. Smt. Poonam Agrawal,
W/o Sri Manoj Agrawal,
R/o C-8/44 A,
Keshavpuram,
Lawrance Road, New Delhi …… Petitioners

Versus

1. Smt. Sushma Agrawal,
W/o Sri Munish Agrawal,
D/o Sri M.P. Garg,
R/o Amrawati Colony,
Tehsil & P.S. Haldwani, Nainital.
2. Sri Munish Agrawal,
W/o Sri Manoj Agrawal,
R/o C-8/44 A,
Keshavpuram,
Lawrance Road, New Delhi …… respondents

Mr. Pankaj Miglani, learned counsel for the petitioners.
Mr. Bindesh Kumar Gupta, learned counsel for respondent No. 1.

Hon'ble Prafulla C. Pant, J.

By means of this petition, moved under Article 227 of the Constitution of India, the petitioners have sought direction in the nature of writ of certiorari for quashing the order dated 24.08.2004 passed by learned Principal Judge, Family Court, Nainital.

2) Brief facts of the case as narrated in the petition are that respondent No. 1 has filed an application under Section 8, 9 and 25 of the Guardians and Wards Act, 1890 read with Section 6-A and 13 of Hindu Minority and Guardianship Act, 1956, seeking custody of minor child Sidharth from the custody of the petitioners. The said application was registered as case No. 19 of 2003 Sushma Agrawal Vs. Munish Agrawal and others. As per the said application Sushma Agrawal got married to respondent No. 2 on 19.11.1999 and from their wedlock Master Sidharth got born on 16.12.2000. Petitioner Nos. 1 and 2 are brother and sister of respondent No. 2. It is alleged in the application that respondent No. 1 was turned out of her matrimonial house at Delhi and Master Sidharth is in the custody of the petitioners at Delhi. Learned Principal Judge, Family Court issued notices in the aforesaid case in response to which an application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 was moved in view of the Section 9 of Guardians and Wards Act, 1890. Learned Principal Judge, Family Court framed an issue as to the jurisdiction of the Court and fixed the next date 24.08.2004 (copy of the order Annexure- 4). Learned Principal Judge, Family Court, without giving finding as to its jurisdiction directed vide its order dated 03.11.2004 (copy Annexure- 5) directed the petitioners to produce the minor in the Court. Aggrieved by said order, this petition has been filed alleging the order to be illegal and against the provisions of law.

3) A counter affidavit has been filed on behalf of the respondent No. 1 in which it has been admitted that respondent No. 1 got married to respondent No. 2 on 19.11.1999 and it is also admitted that a male child was born out of their wedlock on 16.12.2000. It is alleged in the counter affidavit that the

relations with the petitioners and respondent No. 1 did not remain cordial due to alleged bad behaviour on their part and respondent No. 1 had to leave her matrimonial house for no fault on her part. It is further stated in the counter affidavit that proceedings of section 125 of the Code of Criminal Procedure, 1973, were initiated at the instance of respondent No. 1, and respondent No. 2 has yet not complied with the order of maintenance passed by learned Principal Judge, Family Court, Nainital. It is further alleged that the answering respondent is deprived of the custody of her minor son. Lastly, it is stated that the petitioners are delaying the proceedings before the Family Court.

4) I heard learned counsel for the parties and perused the affidavit and counter affidavit alongwith the annexures annexed thereto.

5) Short question for consideration before this Court is, whether the impugned order suffers from any illegality or not?

6) Before further discussion it is pertinent to mention provisions contained in Clause (1) of Section 9 of the Guardians and Wards Act, 1890, which reads as under:

> **9. Court having jurisdiction to entertain application.-**
> (1) *If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.*

Learned counsel for the petitioners drew my attention to the address of the petitioners as mentioned in the application (copy Annexure- 1) before the Principal judge, Family Court. The

address of the petitioners is shown to be "C-8/44 A, Keshavpuram, Lawrance Road, New Delhi." My attention was also drawn to the prayer clause of the application, which reads as under:

> "अतः महोदय से सादर प्रार्थना है कि विपक्षीगण उपरोक्त की अभिरक्षा में उनके निवास सी –8–44 ए केशव पुरम लारेंस रोड नई दिल्ली पर रखा है को विपक्षीगण की अभिरक्षा से निकाल कर न्यायालय में उपस्थित कराने हेतु कार्यवाही कर उसे प्रार्थिनी के संरक्षण और अभिरक्षा में सौपें जाने हेतु न्यायाचित आदेश उक्त नाबालिग पुत्र सिद्धार्थ के बेहतर भविष्य एवं कल्याण तथा अधितम हितों की समुचित देखभाल हेतु सुपर्द किये जाने की महति कृपा की जाए।"

In view of above facts, it is argued that the jurisdiction under the guardians and Wards Act, 1890 will be only with the Court at Delhi and not the Court at Nainital. The objection appears to have been raised before learned Principal Judge, Family Court under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. Said provision of the Code makes it clear that the jurisdiction is to be seen on the basis of the allegation contained in the plaint itself.

7) On perusal of the impugned orders (copy Annexure No. 4 and 5) it is clear that the learned trial Court has erred in law by framing the issue before the written statement is filed as to the jurisdiction. The order, copy of which is annexed as Annexure-4 to the petition shows that it was passed prior to 24.08.2004 as next date fixed is 24.08.2004. Copy of written statement shows that it was filed before the learned trial Court on 24.08.2004. That being the case, issue was framed even prior to filing of the written statement. Learned Principal Judge, Family Court should have decided the matter as to the objection under Order VII Rule 11(d) before passing the order (copy Annexure- 5)

directing the present petitioners to produce the child in the Court.

8) In the circumstances and in view of the above discussion, this Court clearly finds that the orders Annexure- 4 and Annexure- 5 are against the provisions of law and with wrong exercise of jurisdiction. The petition under Article 227 of the Constitution of India is allowed. The impugned orders, copies of which at Annexure- 4 and Annexure- 5, are quashed. Learned Principal Judge, Family Court, Nainital is directed to pass fresh orders, after examining the matter as to the jurisdiction, on objection under Order VII Rule 11(d) of the Code of Civil Procedure on the basis of the allegations contained in the plaint / application, before passing any orders as to the custody of child. No order as to costs.

(Prafulla C. Pant, J.)

Dt.: 17th November, 2004
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